STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2004
v	No. 243965 Oakland Circuit Court
DARRYL JEROME ERVIN, Defendant-Appellant.	LC No. 02-182260-FH

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Darryl Jerome Ervin appeals as of right from his jury convictions of possession with intent to deliver between 50 and 225 grams of cocaine[1] and conspiracy to deliver less than fifty grams of cocaine.[2] Defendant was tried jointly with his alleged coconspirators, Antonio Dean, Daniel Lee, and Thomas Brooks.[3] Defendant was sentenced to consecutive terms of five to twenty years' imprisonment for possession, and one to twenty years' imprisonment for conspiracy. We affirm.

I. Background Facts

On November 13, 2001, Royal Oak police officer Martin Lavin arranged to meet Mr. Dean at an Oakland County Kentucky Fried Chicken to purchase two ounces of cocaine. Mr. Dean arrived at the meeting with his codefendants in a black Lincoln. With several surveillance officers listening over a radio transmission, defendant, along with his codefendants, encouraged Officer Lavin to meet them at a Wendy's within the city of Detroit to complete the transaction. At the subsequent meeting, Mr. Dean attempted to sell Officer Lavin approximately fifty-five grams of cocaine contained in two clear plastic bags. The officers immediately arrested all four

[1] MCL 333.7401(2)(a)(iii).

[2] MCL 333.7401(2)(a)(iv).

[3] All four codefendants were convicted of delivery and conspiracy. Mr. Dean has not appealed his convictions or sentences. Our opinions in *People v Lee* (Docket No. 243964) and *People v Brooks* (Docket No. 245252) are being released with this opinion.

codefendants. During the arrest and booking procedure, the officers seized $415 and a cellular telephone from Mr. Brooks and $228 from defendant.

II. Coconspirator Statements

Defendant first claims that the trial court erred in permitting the prosecution to present hearsay statements of codefendants. Specifically, defendant complains that statements made by codefendants to Officer Lavin were hearsay and their admission violated his constitutional right to confront the witnesses against him. We disagree. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[4] However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.[5]

On direct examination, Officer Lavin testified regarding his prior arrangement to purchase cocaine from Mr. Dean. Officer Lavin further testified to various statements made by defendant and his codefendants during the initial meeting at Kentucky Fried Chicken. Mr. Dean indicated that the cocaine belonged to the other men and that they were not comfortable with the location of the transaction. Mr. Dean encouraged Officer Lavin to follow them to another location in the city of Detroit. Defendant twice approached Officer Lavin's vehicle. Defendant first told Officer Lavin, "If you want this shit then you're going to have to follow us up the street."[6] Defendant later returned to Officer Lavin's vehicle offering to allow him to hold onto $2000. Defendant stated, "Man we ain't going to rob you. I don't care about your money. Man, here's two grand, you can hold it if you want to."[7] Mr. Brooks also encouraged Officer Lavin to follow the men up the street to purchase the cocaine. The codefendants reentered the Lincoln and drove up next to Officer Lavin's vehicle. From the driver's seat, Mr. Lee arranged to meet Officer Lavin at the Wendy's location later that evening. Mr. Lee indicated that they needed to pick up the cocaine before the meeting.[8]

A statement is not hearsay under MRE 801 if made by a coconspirator of the party against whom the statement was offered and if made during the course of and in furtherance of a conspiracy.[9] The independent proof must establish a conspiracy's existence by a preponderance of the evidence.[10] Neither direct proof of the agreement, nor a formal agreement, need be shown

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[4] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[5] *Id.*

[6] [Trial Transcript July 2, 2002, p 62.]

[7] [Trial Transcript July 2, 2002, p 66.]

[8] Officer Lavin's testimony regarding the substance of these conversations was corroborated by the testimony of three surveillance officers.

[9] MRE 801(d)(2)(E).

[10] *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982).

to prove the conspiracy.[11] Circumstances, acts, and conduct of the parties can sufficiently demonstrate an agreement in fact.[12] Furthermore, circumstantial evidence and inference may be used to establish a conspiracy.[13]

We first note that the coconspirators' statements were made during the course of and in furtherance of the conspiracy. The statements were made in the course of arranging the actual transaction. However, the trial court improperly admitted the statements of defendant's coconspirators without first determining that a conspiracy existed. A trial judge must determine preliminary questions regarding the admissibility of evidence rather than leaving the decision to the jury.[14] The trial court must resolve preliminary questions of fact, including the existence of a conspiracy, before admitting the evidence.[15] The trial court erred as it failed to determine whether the prosecution had proven the existence of a conspiracy by a preponderance of the evidence before admitting the statements of defendant's coconspirators.

However, the trial court's error did not amount to prejudicial error, and therefore, we decline to reverse defendant's convictions.[16] The prosecution presented sufficient independent evidence to prove the existence of a conspiracy. Evidence of the coconspirators' concerted actions, independent of their statements, demonstrates a common goal. Defendant's own statement requesting Officer Lavin to "follow *us*" in order to complete the transaction is evidence of a combined action. Therefore, a conspiracy can be shown by evidence independent of codefendants' statements.

III. Severance

Defendant also alleges that the trial court abused its discretion by denying his motion to sever his trial. We review a trial court's decision to join or sever codefendants' trials for an abuse of discretion.[17] Severance is mandatory "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that . . . demonstrates that his substantial rights will be prejudiced and that severance is the necessary means to rectifying the potential prejudice."[18] As defendant failed to present such proof or affidavit, defendant must show that he

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[11] *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

[12] *Id.*

[13] *Id.*

[14] MRE 104(a); *Vega*, *supra* at 780.

[15] *Bourjaily v United States*, 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987) (construing FRE 104(a), which is identical to the Michigan rule); *Vega*, *supra* at 779-780.

[16] *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

[17] MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

[18] MCR 6.121(C); *Hana*, *supra* at 346-347.

suffered actual prejudice at trial to warrant reversal of the trial court's determination regarding joinder.[19]

Defendant claims actual prejudice as he was unable to inculpate Mr. Dean in order to exculpate himself. However, defense counsel presented the theory that defendant was being blamed for another's crime. Mr. Dean defended on the basis of reasonable doubt, which did not conflict with defendant's defense. Furthermore, as discussed *supra*, the statements made by codefendants were properly admitted into evidence, so their use against defendant was not a result of the joined trial. Defendant suffered no actual prejudice at trial, and reversal of the trial court's joinder decision is unwarranted.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

[19] *Hana*, *supra* at 346-347.